Filed 2/15/11 P. v. Mays CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RENAL ALVIN MAYS,<br><br>Defendant and Appellant. | B222621<br><br>(Los Angeles County<br>Super. Ct. No. KA085424) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven D. Blades, Judge. Affirmed as modified and remanded with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Eric E. Reynolds, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Renal Alvin Mays appeals his conviction of multiple charges, including nine counts of rape and commission of lewd acts upon a child. Appellant contends that (1) the court erred in permitting the victim of an uncharged offense to testify concerning his inappropriate conduct toward her; (2) Evidence Code section 1108, which permits admission of evidence of uncharged sexual offenses to support the guilt of an alleged sexual offender, deprives him of due process and equal protection; (3) the evidence that one of his victims became pregnant and delivered a child was insufficient to support a finding of great bodily injury; and (4) the trial court imposed inappropriate determinate terms for two of the counts.[1] We conclude that all except the last of appellant's contentions lack merit. Accordingly, we strike the determinate terms imposed on counts 12 and 16 and remand for correction of the abstract of judgment. We otherwise affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

Appellant was charged in a 17-count information with false imprisonment (Pen. Code, § 236, count one),[2] child stealing (§ 278, count two), child abuse (§ 273, subd. (a), count three), forcible lewd acts upon a child (§ 288, subd. (b)(1), counts four through eight, 16 and 17), forcible rape, (§ 261, subd. (a)(2), counts nine through 13), and possession of child pornography (§ 311.11, subd. (a), count 14).[3] The primary victim of the sexual abuse was appellant's step-daughter, IE, the

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1 Respondent concedes that the sentence imposed was not in accordance with law.

2 Unless otherwise designated, statutory references are to the Penal Code.

3 A second count of possession of child pornography (count 15) was dismissed by the court as duplicative.

named victim in counts one and four through 13.[4] The second victim, referred to in the information and at trial as Jane Doe No. 2 was named in counts 16 and 17.[5] With respect to count 12, it was further alleged that the victim incurred great bodily injury within the meaning of section 667.61, subdivision (a), (b) and (e). With respect to count 16, it was further alleged that there were multiple victims within the meaning of section 667.61, subdivision (a), (b) and (e).

B. *Evidence at Trial*

1. *Prosecution*

a. *Evidence Related to IE*

The first act of sexual abuse IE recalled occurred in appellant's bedroom when she was 12. Appellant showed IE photographs which appeared to depict sexual intercourse between appellant and IE or simulated sexual acts and touching

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[4] Count four stated that the lewd act occurred between May 1998 and May 1999; count five stated the lewd act occurred between May 1999 and May 2000; count six stated the lewd act occurred between May 2000 and May 2001; count seven stated the lewd act occurred between May 2001 and May 2002; count eight stated the lewd act occurred between May 2002 and May 2003; count nine stated the rape occurred between May 2003 and May 2004; count 10 stated the rape occurred between May 2004 and May 2005; count 11 stated the rape occurred between May 2005 and May 2006; count 12 stated the rape occurred between May 2006 and May 2007; count 13 stated the rape occurred between May 2007 and May 2008. IE was born in May 1989. She would have been nine in May 1998.

[5] Jane Doe No. 2, whose designation derived from the fact that IE was referred to as Jane Doe No. 1 at the preliminary hearing, will be referred to herein as "Jane Doe." Both counts sixteen and seventeen stated the lewd acts occurred between June 2005 and December 2005. Jane Doe was eight at the time of the alleged lewd acts. The alleged victim in the child stealing and child abuse counts (counts two and three) was the infant son of IE, referred to at trial as John Doe. The child stealing and child abuse counts are not at issue in this appeal.

of IE by her mother, Y.A., while IE slept.[6] Appellant told IE these activities, which IE could not recall, had begun when she was nine and took place after she had been given sleeping pills. Appellant placed a gun on the bed and said that he wanted to take pictures of IE. He said if IE told anyone about their activities, he would kill IE's father and ensure that IE's mother went to jail. That day, appellant took pornographic pictures of IE; the next day he performed vaginal intercourse. In the period that followed, appellant sexually abused IE countless times, either through vaginal intercourse or by forcing her to perform fellatio. Appellant also sometimes put his mouth on IE's genital area. Appellant timed his assaults so that they occurred after Y.A. had left for work in the afternoon and before appellant's son came home from football practice. IE consistently told appellant she did not want to engage in sexual acts with him.[7] Appellant would get angry and choke or hit IE or threaten her with his gun. In addition, appellant repeated his threats to kill IE's father and ensure that her mother went to prison if she told anyone.

After IE turned 13 in 2002, the abuse became more frequent because appellant's son moved out of the family home for a period of time. In 2003, IE became pregnant and appellant took her to have an abortion without informing Y.A.[8] When IE turned 14, the sexual abuse continued and the physical abuse -- hitting and choking -- became more frequent. Once, appellant hit IE's head into a wall so hard that she required stitches. As IE grew older, appellant began to

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[6] No photographs of IE as a young child were found or introduced into evidence.

[7] IE tried to kill herself soon after the sexual abuse began by taking a bottle of asthma pills, but they only made her sick.

[8] The defense presented records from a 2003 medical examination of IE that indicated she was not pregnant. The records did indicate that her physical state was consistent with prior sexual assault.

control her activities in various ways, such as by forbidding her to go out with her friends, to engage in afterschool activities or to spend the night at anyone's house.

When IE was 15, appellant induced her through threats to say that her biological father was molesting her.[9] IE subsequently told appellant it was not true. Appellant nevertheless coerced her into repeating the allegations to Y.A. and making a police report.[10] The sexual and physical abuse continued when IE turned 16. In addition, after IE turned 16, appellant began taking naked photographs of IE in revealing poses.[11] IE told him she did not want to be photographed. Appellant continued to issue threats against IE and her family to induce her to cooperate. When IE turned 17, she became pregnant again as appellant's abuse and threats continued. After IE turned 18 and delivered the baby, appellant persuaded Y.A. to join appellant and IE in various sexual activities.[12] Appellant took multiple pictures of these activities.[13]

Initially convinced that her baby was fathered by her boyfriend with whom she had been intimate, IE moved out of the family home and in with her boyfriend and his family for a short time. This ended when her boyfriend's mother learned through paternity testing that the baby was not the boyfriend's. In August 2008, IE moved into her own apartment with the baby. Appellant appeared at the apartment

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[9] This occurred at a time when IE's father was attempting to gain custody of IE.

[10] No charges were filed.

[11] The photographs were introduced into evidence.

[12] DNA testing conducted by the prosecution identified appellant as the likely father of IE's baby.

[13] Photographs of appellant, IE and Y.A. engaged in sexual acts or simulated sexual acts were introduced into evidence.

one day, while she was at school. He had moved himself in, disconnected the phone jacks and the internet connection, put locks on the windows, and changed the lock on the door to a double-key deadbolt. Thereafter, whenever IE left the apartment, appellant went with her. He kept a knife with him which he threatened to use on her if she tried to run away.

In November 2008, appellant took IE and the baby to the Department of Social Services (DSS) to obtain financial aid. Outside of appellant's presence, she let DSS personnel know about the physical and sexual abuse she had been suffering. IE was eventually directed to the sheriff's department to press charges. In the meantime, appellant disappeared with the baby.[14]

In 2008, after giving birth to John Doe, IE told appellant's sister, Janice Taylor, that appellant had been molesting her since she was nine and that it was ongoing and sometimes involved Y.A. Taylor later stayed with IE and appellant in IE's apartment for a few days and observed that the door had a double-key deadbolt and that appellant kept the key. Sometime around this period, appellant told Taylor he was contemplating killing IE, the baby, and himself if IE "didn't get her life together" and "do what she needed to do." Appellant tried to convince Taylor that his older son was the baby's father by showing her a letter his son had purportedly written to IE. Taylor believed the letter was a forgery. Taylor was afraid to report appellant to the authorities because he had threatened her in the

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[14] Appellant was arrested in December 2008. At the time of the arrest, appellant was locked in the bathroom of a relative's home in Los Angeles, holding the baby and a knife. He and the baby were covered in blood from appellant's apparent attempt to commit suicide by cutting his own throat. Appellant was unconscious. The baby had a weak pulse and did not appear to be breathing. An officer revived him by giving mouth-to-mouth resuscitation.

past and because she was concerned about family repercussions. Shortly before his arrest, appellant gave Taylor keys to a storage unit, some letters and an audiotape.[15]

The prosecution also called appellant's son, Renal Rashaad Mays, who had begun living with appellant, Y.A. and IE when he was 12 (1998).[16] Shortly thereafter, appellant began for the first time to require Rashaad to maintain a regular early bedtime. Rashaad noticed appellant giving IE Nyquil when she did not appear to be sick. This generally occurred on nights when Y.A. was at work. When Rashaad was 13 or 14, he concluded based on various observations that after Y.A. left for work, appellant had a practice of going into IE's bedroom and staying for an hour or more.[17] Rashaad also noticed that appellant hugged IE in a way that did not seem appropriate for a family member. When Rashaad was 14 or 15, he said to appellant "I know what you've been doing with [IE]," and told appellant about observing him go into IE's bedroom when Y.A. was gone.[18] Appellant denied abusing IE; he did not deny going into her bedroom, but gave no good reason for his actions. After Rashaad made the accusation, appellant tried to

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[15] Taylor gave the keys to the police. Officers searched the storage unit and found photographs, some videotapes and a compact disc. The primary subject of the photographs was IE, depicted without clothing. Similar pictures of IE were also found on a computer located in the apartment where IE and appellant had lived shortly before his arrest.

[16] Appellant's son will be referred to as Rashaad, the name he used at the time of trial.

[17] Rashaad testified that he did not actually see appellant go into IE's room, but based his conclusion on noises he heard, including the sound of doors opening and closing. In addition, he occasionally looked into appellant's room when he got up to use the bathroom and saw it empty.

[18] Rashaad also asked IE if appellant was molesting her. She always said "no."

persuade Rashaad to have sex with IE, which Rashaad sometimes falsely claimed to have done to stop appellant from pressuring him.[19]

b. *Evidence Related to Jane Doe*

Jane Doe was Y.A.'s grandniece. When she was visiting Y.A. and IE overnight at the age of eight or nine, appellant came into the bedroom, pulled down her underwear and put his penis in her vagina. It happened a second time during a later visit.[20] On that occasion, appellant called her into his room and closed the door. He told her to lay on the bed. He put a pillow over her head, pulled down her pants and abused her in the same way. He put some kind of cream or lotion on her either before or after. After he was finished, he poured bullets into her hands and said if she told anyone, he would kill her and her family.[21] Jane Doe had nightmares for years after the incidents.

Jane Doe's mother testified that the girl first reported the sexual abuse in 2006, when her mother was preparing her for another overnight visit with appellant, Y.A. and IE. The girl gave her mother various excuses to avoid going

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[19] Rashaad eventually ran away from home and lived with a friend's family for more than a year. While he was living there, appellant showed him a gun -- an Uzi -- and warned him not to tell the friend's family about appellant's "business." Another time, after Rashaad had returned home and run away again to live with his aunt, appellant came to see him, carrying a paper bag with the Uzi in it. Appellant choked Rashaad and put the Uzi in his mouth. After that incident, Rashaad went to live with another family and never returned to live with appellant.

[20] At trial, Jane Doe could recall only two occasions. In a videotaped interview shown to the jurors, the girl said appellant did something "he wasn't supposed to . . . mostly every day when [she went to his home]" and that she was at his home often.

[21] At trial, Jane Doe could not recall being threatened with a gun. In her interview, she said appellant showed her a gun. She also stated in the interview, but not at trial, that on one occasion, appellant had a camera and took pictures of her.

and then started to cry. Prior to that visit, Jane Doe had always been eager to see Y.A. and IE and had spent a great deal of time with them. Jane Doe told her mother that the incidents of abuse occurred between June and December 2005. Jane Doe said that appellant had threatened to kill her mother, father and sister if she told anyone about the abuse. Jane Doe and her mother reported the incidents to the police, but charges were not filed at the time.

c. *Evidence Relating to Uncharged Offenses*

N.T., the niece of appellant's former wife, testified that when she was visiting appellant's home at age eleven (in 1995), appellant put his hand inside her pants on top of her vagina. He said, "Oh, that's good, you're not nervous." N.T. pulled appellant's hand off and ran away. After that, she stayed away from appellant and his home, but on another occasion, appellant came to N.T.'s home when she was there alone. On that occasion, he briefly put his hand on her breast, under her clothing. A short time later, while N.T. pretended to be asleep on a sofa, he put his hand inside her pants again. This time, he put his finger inside her vagina. N.T. reported this incident to her friends, a teacher and social services. Afterward, her mother kept her away from appellant.

d. *Expert Testimony*

Child sexual abuse expert Dr. Jayme Jones testified that it is very common for children who have been molested by someone they know to conceal the abuse, due in part to feelings of guilt, complicity and helplessness. When abused children finally discuss the abuse with someone, they tend to reveal information in pieces, a little at a time, and the information revealed to different people can be inconsistent. If family upheaval results, the victim may retract the story. The victim also may try to direct attention away from the abuser by accusing another person of abuse.

2. *Defense Evidence*

The defense called a detective who had interviewed IE when Jane Doe accused appellant of sexual abuse in 2006. IE told the detective she did not believe Jane Doe, that she was responsible for watching the girl and that she had never left the girl alone with appellant.[22] IE also told the detective she had been abused by her biological father and that she had never seen appellant with a gun. The detective who searched the storage facility and the apartment where IE and appellant lived prior to his arrest testified that she recovered no gun or bullets at either location.

Samantha Mays (Samantha), appellant's sister, testified that during the period Rashaad was staying with her, she called appellant to come talk to the boy because he was missing school and getting poor grades. Appellant did not have anything in his hands when he arrived and went to talk to Rashaad. Samantha heard sounds of an argument and a struggle and heard Rashaad say "he['s] got a gun." She hurried into the room, but did not see a gun. After the confrontation, Rashaad left with appellant and did not appear fearful or concerned.

Appellant testified on his own behalf. He denied sexually abusing IE when she was a child. He admitted having intercourse with IE once, when she was 17. He said that she instigated it by coming into his bed while he was asleep. He said Y.A. found out about his sexual experience with IE and he persuaded Y.A. to participate in the sexual activity shown in the photographs to ensure her silence. He denied that the photographs taken of IE at 16 were his or that he was present when they were taken. He contended they had been sent to IE by her boyfriend. He denied having knowledge of how to operate a computer and denied inputting

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[22] IE testified that she made these statements to officers because she was afraid of appellant, and that he had become more violent after Jane Doe made the accusation.

the photographs that had been found when police seized the computer located in the apartment he and IE had shared. He denied having a gun when he confronted Rashaad at Samantha's home or at any other time. He acknowledged warning Rashaad not to tell the friend's family about his "business," but said he was referring to family problems, including problems with drugs, not anything about IE. He said that the storage unit was rented by Y.A., not by him. He denied touching N.T. He denied ever being alone with Jane Doe. He said that on her last visit, Jane Doe had been disciplined for getting lost during a trip to an amusement park. He also said there was a rift between his family and Jane Doe's family due to IE's accusations against her biological father.

Appellant further testified that he, his sons and Y.A. all moved into the apartment IE claimed to have rented on her own in August 2008. He admitted changing the locks, but said that this was his common practice and that everyone who lived there had a key. Appellant said he left IE at the DSS offices and took the baby back to the apartment because he believed she had been arrested or detained for fraud. He heard about IE's allegations weeks later from Y.A. He spoke to a detective about turning himself in and surrendering the baby. Instead, he decided to kill himself and keep the baby with him until the end. He denied hurting the baby.

C. *Verdict and Sentencing*

Appellant was found guilty of count one (false imprisonment), count two (child stealing), count three (child abuse), counts seven and eight (commission of lewd acts upon IE between May 2001 and May 2003), counts nine through 13 (forcible rapes of IE), count 14 (possession of child pornography), and count 16 (commission of lewd act upon Jane Doe). Appellant was found not guilty of counts four, five, six (commission of lewd acts upon IE between May 1998 and

May 2001) and count 17 (commission of lewd act upon Jane Doe). The jury also found true the allegations under section 667.61 asserted in connection with counts 12 and 16 that there were multiple victims and that IE incurred great bodily injury as the result of rape.

The court sentenced appellant to a total term of 92 years to life, composed of the high term (eight years) for counts seven, eight, nine, 10, 11, 12, 13, and 16; one-third the midterm for counts one, two and three (eight months, one year, and 16 months, respectively), all to run consecutively, and a sentence of one year in the county jail for count 14, to run concurrently. The court added an indeterminate term of 25 years to life for count 16 under section 667.61. This appeal followed.

## DISCUSSION

A. *Evidence of Uncharged Sexual Offenses*

1. *Admissibility*

During the trial, the prosecutor announced his intent to call N.T. to testify that appellant had improperly touched her on two occasions, both of which constituted uncharged violations of section 288, lewd acts upon a child. Appellant's counsel objected on Evidence Code section 352 grounds. The court found that the evidence was admissible under Evidence Code section 1101 to support that appellant had the intent of sexual gratification when he committed the charged sexual offenses.[23] The court further found that the testimony was

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[23] Evidence Code section 1101, subdivision (a) provides that "[e]xcept as provided in this section and Sections 1102, 1103, 1108 and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, opportunity, intent,
*(Fn. continued on next page.)*

admissible under Evidence Code section 1108 and that its relevance was not substantially outweighed by the danger of undue prejudice.[24] Appellant contends that the court erred in permitting the prosecution to introduce N.T.'s testimony because the evidence was "unduly prejudicial and cumulative as to intent under section 1101, subdivision (b)" and "unduly prejudicial and insufficiently probative under section 1108." We conclude the evidence was admissible under Evidence Code section 1108, and, therefore, do not reach the issue of its admissibility under Evidence Code section 1101.

The Legislature enacted Evidence Code section 1108 "to expand the admissibility of disposition or propensity evidence in sex offense cases"; "to relax the evidentiary restraints section 1101, subdivision (a), imposed"; and "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) "In this regard, section 1108 implicitly abrogates prior [judicial] decisions . . . indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Ibid*.) The Legislature "'has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence'" and that "'the need for this evidence is "critical" given the serious and secretive nature of sex crimes and

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preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

[24] Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not inadmissible pursuant to Section 352."

the often resulting credibility contest at trial.'" (*Ibid*., quoting *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182 (*Fitch*).) "[S]ection 1108 '"permits courts to admit such evidence on a common sense basis -- without a precondition of finding a 'non-character' purpose for which it is relevant -- and permits rational assessment by juries of evidence so admitted. This includes consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.'"" (*Falsetta*, *supra*, at p. 912, quoting Letter by Assemblyman Rogan regarding Assem. Bill No. 882 (1995-1996 Reg. Sess.) published in 2 Assem. J. (1995-1996 Reg. Sess.) p. 3278.)

In determining whether to admit evidence of uncharged sexual offenses at the trial of an alleged sexual offender, the court is required to "engage in a careful weighing process under section 352" and consider such factors as "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) "[T]he probative value of the 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense." (*Ibid*., quoting *People v. Balcom* (1994) 7 Cal.4th 414, 427.) Appellate review of a trial court's decision to admit evidence of uncharged sexual offenses is under the deferential abuse of discretion standard and "'"will not be disturbed . . . unless the trial court exercised its discretion in an

arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]'" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

The trial court did not abuse its discretion in permitting N.T. to testify. The incidents she related were not particularly salacious or inflammatory. Nor were they remote in time when compared to the charges, which alleged that the abuse of IE began in 1998. N.T. was unrelated to IE and Jane Doe and had no connection to them. She was related to appellant's second wife and was not involved with appellant during his marriage to Y.A. She reported the incidents to third parties when they occurred in 1995, long before she could have been influenced by the other girls' accusations. Appellant contends there was no need to call the victim of uncharged incidents to bolster the credibility of the complaining witnesses because there were already multiple victims alleged. That is incorrect. IE's credibility was subject to question because she had, by her own admission, falsely accused her biological father of abuse and had, in addition, repeatedly denied that appellant was abusing her when questioned by family members and officials. Jane Doe was still a young girl at the time of trial, and her testimony was inconsistent with parts of her videotaped interview. The incidents N.T. related were sufficiently similar to the offenses of which appellant was accused to assist the jury in its determination of the complaining witness's credibility and his guilt. All involved young girls related to appellant by marriage, who had spent time with him and his family and were comfortable in his presence. N.T.'s age -- 11 -- was similar to Jane Doe's on the occasions when she was molested and IE's when she suffered the first instance of abuse that she recalled. Although appellant did not go as far with N.T. as he had with the other victims, that can be explained by the fact that N.T. fought back by removing his hand and running away on the first occasion and by the fact that on the other occasion, they were in her home where appellant could not be sure of

privacy. As the court stated in *People v. Soto* (1998) 64 Cal.App.4th 966, 991-992: "[T]he propensity evidence was extremely probative of appellant's sexual misconduct when left alone with young female relatives, and is exactly the type of evidence contemplated by the enactment of section 1108 and the parallel federal rules. The prejudice presented by this evidence is the type inherent in all propensity evidence and does not render the evidence inadmissible."

2. *Constitutional Issues*

Appellant further contends that N.T.'s testimony should not have been admitted because admission of such evidence violated his right to due process and equal protection.

In *Falsetta*, the Supreme Court examined whether admitting propensity evidence under Evidence Code section 1108 violated the defendant's constitutional right to due process and concluded: "[T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. . . . 'By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. [Citation.]'" (*Falsetta*, *supra,* 21 Cal.4th at p. 917, quoting *Fitch*, *supra*, 55 Cal.App.4th at p. 183.) With respect to the prospect that equal protection precluded the Legislature from crafting an exception to the propensity for sexual offenders only, the court stated: "'The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]'" (21 Cal.4th at p. 918, quoting *Fitch*, *supra,* 55 Cal.App.4th at

pp. 184-185.) The Supreme Court's determinations are controlling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

B. *Pregnancy as Support for Great Bodily Injury Allegation*

The prosecutor argued that the allegation that IE suffered great bodily injury as the result of rape was established by the fact that she became pregnant at age 17 from one of appellant's sexual assaults. Appellant contends that the jury's true finding was not supported because there was no specific testimony about the pregnancy and its physical impact on IE. We disagree.

The term great bodily injury is defined as "'substantial injury beyond that inherent in the offense.'" (*People v. Cross* (2008) 45 Cal.4th 58, 64, quoting *People v. Escobar* (1992) 3 Cal.4th 740, 746 (italics omitted).) To be significant or substantial, "the injury need not be so grave as to cause the victim '"permanent," "prolonged," or "protracted"' bodily damage." (45 Cal.4th at p. 64, quoting *People v. Escobar*, *supra*, at p. 750.) "Proof that a victim's bodily injury is 'great' . . . is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (45 Cal.4th at p. 66.) In *Cross*, the Supreme Court rejected the notion that a pregnancy, without medical complications, that results from unlawful intercourse was insufficient to support a finding of great bodily injury. (*People v. Cross, supra*, 45 Cal.4th at pp. 63, 65-66.) The court held that determining whether the victim has suffered physical harm amounting to great bodily injury was not a question of law for the court, but a factual inquiry to be resolved by the jury in the context of the particular crime and the particular victim. (*Id*. at pp. 63, 65.) There, the court found that evidence that the victim was 13, had never been pregnant before, and carried the fetus for 22 weeks before undergoing an abortion was sufficient to support the great bodily injury finding. (*Id*. at p. 66.)

Here, the evidence established that IE became pregnant at the age of 17 and carried the baby to term. Pregnancy in a 17-year old girl cannot be considered a trivial or insignificant condition, involving as it does major physical changes and bodily impairment affecting her long-term health and well-being. (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [rape-induced pregnancy in 17-year old girl "amount[ed] to significant and substantial bodily injury or damage" due to physical changes and impairment that followed].) Although IE was not asked to provide the particulars of her personal experience, as in *Cross*, the jurors were urged by the prosecution to use their common sense and their knowledge of the difficulties associated with being pregnant and the pain of labor and delivery. While appellant suggests IE's pregnancy might have been "easy" and her labor "painless," the jury was not required to draw such inferences. Rather, the jurors could reasonably have found that IE suffered serious injury as a result of being unwillingly impregnated by appellant, carrying the fetus to term and delivering a baby. In short, the evidence was sufficient to support the great bodily injury finding.

C. *Sentencing*

The sentence imposed on appellant included two determinate terms of eight years and one indeterminate term of 25 years to life for counts 12 and 16, the two counts under which the jury made special findings. The court purported to act under section 667.61. Appellant contends, and respondent agrees, that the trial court erred in imposing the two determinate terms, and that the determinate terms must be stricken. We agree.

Section 667.61 provides in part that where a person is convicted of certain offenses -- including rape (§ 261) and commission of lewd acts upon a child (§ 288) -- and where more than one of the circumstances specified in subdivision

(e) of the statute are found to be true -- including infliction of great bodily injury and commission of the offenses against more than one victim -- the offender shall be punished by imprisonment in the state prison for a term of 25 years to life. The statute requires the sentence it prescribes to be imposed and divests the trial court of the authority to do otherwise. (*People v. Hammer* (2003) 30 Cal.4th 756, 761.) The Supreme Court has held that section 667.61 is not a sentencing enhancement because "'it is not an "additional term of imprisonment" and it is not added to a "base term."'" (*People v. Acosta* (2002) 29 Cal.4th 105, 118, quoting *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) Rather it "'sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes' when a defendant commits one of those crimes under specified circumstances." (29 Cal.4th at p. 118, quoting *People v. Mancebo* (2002) 27 Cal.4th 735, 741.) By sentencing appellant to determinate terms for counts 12 and 16 and then adding the 25 year to life sentence under section 667.61, the court improperly treated the provision as an enhancement, rather than as an alternate sentencing scheme. The improper portions of the sentence -- the determinate terms for counts 12 and 16 -- must be stricken.

## DISPOSITION

The determinate sentences imposed on counts 12 and 16 are stricken. In all other respects the judgment is affirmed. The clerk of the superior court is directed upon issuance of the remittitur to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.